No. 94-1140

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

44 LIQUORMART, INC. and
PEOPLES SUPER LIQUOR STORES, INC.,
Petitioners,

v.

STATE OF RHODE ISLAND and
RHODE ISLAND LIQUOR STORES ASSOCIATION,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF OF AMICI CURIAE NEWSPAPER ASSOCIATION OF AMERICA, A.H. BELO CORPORATION, ADVANCE PUBLICATIONS, INC., THE COPLEY PRESS, INC., COX NEWSPAPERS, INC., DONREY MEDIA GROUP, DOW JONES & COMPANY, INC., THE HEARST CORPORATION, THE NEW YORK TIMES COMPANY, PROVIDENCE JOURNAL COMPANY, THOMSON NEWSPAPER HOLDINGS, INC., and TRIBUNE COMPANY IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST

Amici curiae are a newspaper association and individual newspaper publishers.* America's newspapers are the

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* Written consent of the parties to the filing of this amicus brief has been filed with the Clerk of the Court as required by Supreme Court Rule 37.

conduit through which a significant amount of commercial information is conveyed to the public. Indeed, advertising revenues provide the fundamental financial support for newspapers' ability to gather and report the news, comment on political and other public events, and publish other forms of speech that this Court repeatedly has recognized are vital to a fully-informed public and the proper functioning of our democratic form of government.

Amici have a three-fold interest in the proceedings before this Court. First and foremost, *amici* support full First Amendment protection for the marketplace of ideas in which citizens receive information and make informed decisions. Newspapers are active participants in that marketplace as speakers, as the means by which other speakers may be heard, and as the vehicle for educating citizens to participate effectively in public and private decisionmaking. The press historically has championed and given life to the vision of the Constitution's Framers that decisions affecting the country and the lives of its citizens be made as a result of vigorous and open public debate in which no one's voice is silenced.

Second, *amici* support protection for commercial speech as an important part of the marketplace of ideas, providing an unimpeded flow of truthful, nonmisleading speech about lawful products. Newspapers are a major link between advertisers (speakers) and consumers (recipients), and the First Amendment was intended to foster the interests of both. "Freedom of speech presupposes a willing speaker. But where a speaker exists, as is the case here, the protection afforded is to the communication, to its source and to its recipients both." *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 757 (1976). As the Court has further recognized, a consumer's interest in the free flow of commercial information "may be as keen, if not keener by far, than his interest in the day's most urgent political debate." *Id.* at 763.

Finally, *amici* support First Amendment protection of truthful and nonmisleading price advertising. Price is one of the most important factors in comparative information about products and services, and newspaper advertising is often the best means of consumer access to this information. Purchasing decisions are made based on availability, price, and quality of goods and services. The ability of advertisers to disclose and consumers to receive price information is instrumental to making fully informed decisions. Governmental restrictions on the public availability of that information undermine not only the market for a particular product or service but also the debate about public policy issues concerning that product or service. Price information is " 'important for private economic decisions by those in need of [the particular] services. Such information is also helpful. perhaps indispensable, to the formation of an intelligent opinion by the public on how well the . . . system is working and whether it should be regulated or even altered.' " *Bates v. State Bar of Arizona*, 433 U.S. 350, 358 (1977) (quoting *In re Bates*, 113 Ariz. 394, 402, 555 P.2d 640, 648 (1976) (Holohan, J., dissenting)).

Restrictions on price advertising are thus directly contrary to the theory of free access to information on which our society is based. *Amici* urge the Court to forbid this paternalistic exercise of power by the State to influence its citizens' thoughts and behavior through public ignorance. Such state strategies must be subjected to the most vigilant judicial scrutiny to prevent otherwise inevitable governmental abuse.

SUMMARY OF ARGUMENT

This Court affords First Amendment protection to commercial speech as a valued part of the marketplace of ideas. Accordingly, the government bears a heavy burden to justify restraints on nonmisleading commercial speech concerning lawful products or services, particularly when those restraints represent the State's attempt to manipulate its citizens' behavior by depriving them of information

vital to fully-informed decisionmaking. The State must prove under *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980), that its restrictions directly advance a substantial State interest to a material degree and that those restrictions are not more extensive than necessary to advance that interest. Rhode Island has not carried that burden.

The State proffers only promoting "temperance" as its substantial interest in banning advertising of alcohol beverage prices. Reducing abuse of alcohol beverages due to individual over-consumption is a substantial interest, but the record shows that the State's price advertising ban does much to protect the members of Respondent Rhode Island Liquor Stores Association from competition, but little, if anything, to promote "temperance." This Court has already held that depriving consumers of information is not a proper means of dampening competition. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976).

The district court expressly found that the evidence the State introduced to prove that its price ban directly advances its purported interest in "temperance" falls far short of the mark. In contrast, the First Circuit used an attenuated series of presumptions—some of which the court helpfully provided itself—to uphold the ban. Not only does record evidence directly contradict these presumptions, but the First Circuit diluted commercial speech jurisprudence to the point of being unrecognizable. Direct and material advancement of a substantial interest is a matter of proof, not conjecture, and if the State cannot provide that proof, it cannot restrict commercial speech. *See, e.g., Florida Bar v. Went For It, Inc.*, No. 94-226, 1995 W.L. 365648 (1995); *Rubin v. Coors Brewing Co*, 115 S. Ct. 1585 (1995); *Edenfield v. Fane*, 113 S. Ct. 1792 (1993).

The State has also failed to prove its price advertising ban is no more extensive than necessary to achieve the

State's purported objective. There are numerous and obvious alternative means to the State's end that do not involve restrictions on speech, and the State did not even try to prove otherwise. The First Circuit's refusal to consider these alternatives flies in the face of the record and this Court's prior decisions. *See Rubin*, 115 S. Ct. at 1593-94; *City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505, 1510 n.13 (1993). The Twenty-first Amendment has no applicability to restrictions on speech protected by the First Amendment and neither lightens the State's burden of proof, nor provides any additional presumption of validity to the State's action.

The First Circuit's conclusion that Rhode Island's price advertising ban is one among other "reasonable" means of achieving the State's objective finds no support in the record and is squarely at odds with this Court's commercial speech jurisprudence. The State's speech ban is unconstitutional and should be struck down.

ARGUMENT

I. THE FIRST AMENDMENT STRONGLY PROTECTS COMMERCIAL SPEECH.

The Court first recognized the high value of commercial speech in *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976). That case, like this one, involved a paternalistic regulatory scheme that prohibited advertising the price of a lawful product. In striking down that restriction, the Court observed that commercial speech is worthy of First Amendment protection for many of the same reasons that other forms of speech are protected:

> Advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price. So long as we preserve a predominantly free enterprise

> economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable. And if it is indispensable to the proper allocation of resources in a free enterprise system, it is also indispensable to the formation of intelligent opinions as to how that system ought to be regulated or altered. Therefore, even if the First Amendment were thought to be primarily an instrument to enlighten public decision-making in a democracy, we could not say that the free flow of information does not serve that goal.

Id. at 765 (citations omitted).

The Court has continued to find that "the free flow of commercial information is 'indispensable to the proper allocation of resources in a free enterprise system' because it informs the numerous private decisions that drive the system." *Rubin v. Coors Brewing Co.*, 115 S. Ct. 1585, 1589 (1995) (quoting *Virginia Pharmacy*, 425 U.S. at 765); *accord, e.g., City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505, 1512 (1993) (commercial speech "serves individual and societal interests in assuring informed and reliable decisionmaking"); *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 561-62 (1980) ("Commercial expression not only serves the economic interests of the speaker, but also assists consumers and furthers the societal interest in the fullest possible dissemination of information."). The Court thus has recognized that protection of commercial speech provides the public with unfettered and truthful information, affording the most effective foundation for informed decisionmaking in our open society by citizens who will " 'perceive their own best interests if only they are well enough informed.' " *Central Hudson*, 447 U.S. at 562 (quoting *Virginia Pharmacy*, 425 U.S. at 770).

Commercial speech, like political speech, thus plays an important and valued role in the First Amendment's free marketplace of ideas.

> The commercial marketplace, like other spheres of our social and cultural life, provides a forum where ideas and information flourish. Some of the ideas and information are vital, some of slight worth. But the general rule is that the speaker and the audience, not the government, assess the value of the information presented.

Edenfield v. Fane, 113 S. Ct. 1792, 1798 (1993). Accordingly, the Court has extended substantial constitutional protection for truthful commercial speech about lawful products and services, and its "decisions involving commercial speech have been grounded in the faith that the free flow of commercial information is valuable enough to justify imposing on would-be regulators the costs of distinguishing the truthful from the false, the helpful from the misleading, and the harmless from the harmful." *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 646 (1985); *accord Ibanez v. Florida Dept. of Business and Professional Regulation*, 114 S. Ct. 2084 (1994); *Board of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989); *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466, 487 (1988). Government regulation of commercial speech is subject to searching evaluation by the courts, and the government bears substantial factual burdens to justify limits—especially bans—imposed on such speech. *E.g., Ibanez*, 114 S. Ct. 2084; *Edenfield*, 113 S. Ct. 1792.

The Court established a framework for judicial evaluation in *Central Hudson* and repeatedly has emphasized the vital role of the judiciary in holding government to its First Amendment burden of proof to justify restrictions on commercial speech. The government must prove that, (1) if the speech concerns a lawful product or service and is not false or misleading, (2) a real and substantial interest underlies the government's restriction on speech;

(3) the restriction directly advances the government's interest in a material way; and (4) the restriction is no more extensive than necessary to achieve that interest in light of available alternatives with less impact on speech. A restriction on commercial speech cannot survive the government's failure to satisfy its burden of proof on any one of these factors. *E.g., Rubin*, 115 S. Ct. at 1589.

The district court correctly found that Rhode Island failed to carry its burden of proof to defend its prohibition on alcohol beverage price advertising. The First Circuit disregarded the district court's careful and thorough analysis of the record evidence, gave only lip service to this Court's commercial speech jurisprudence, and essentially deferred to the State's asserted justification of its restraint of truthful, nonmisleading speech. This Court, therefore, is called on once again to reaffirm the importance of, and the protection afforded, commercial speech and to hold the government to its proper burden of proof —a burden that Rhode Island simply has not carried.

II. RHODE ISLAND'S ASSERTED "SUBSTANTIAL INTEREST" IS EXTREMELY LIMITED.

The first part of the *Central Hudson* inquiry is not implicated here. The parties and the lower courts all acknowledged that the speech at issue concerns a lawful product and is not false or misleading. *See 44 Liquormart, Inc. v. Rhode Island*, 39 F.3d 5, 6 (1st Cir. 1994), *cert. granted*, 63 U.S.L.W. 3783 (May 2, 1995). Indeed, with the exception of price tags on the merchandise itself, the challenged statute prohibits "advertising in any manner whatsoever of the price" of alcohol beverages, regardless of its verifiable truth or its utter lack of potential to mislead consumers. R.I. Gen. Laws § 3-8-7. The government, therefore, must be put to its proof under the remaining parts of the *Central Hudson* test.

Pursuant to the second *Central Hudson* factor, the parties stipulated that "the State of Rhode Island has a substantial interest in regulating the sale of alcoholic

beverages." *44 Liquor Mart, Inc. v. Racine*, 829 F. Supp. 543, 545 (D.R.I. 1993), *rev'd, 44 Liquormart*, 39 F.3d 5. A general interest in regulating the *sale* of alcohol beverages, however, bears no relationship to *speech* on that subject. *See Rubin*, 115 S. Ct. at 1590 n.2. The State further asserts that its interest in regulating alcohol beverage sales extends to fostering "temperance." *Id.* The statute embodying Rhode Island's price advertising ban nowhere uses—much less defines—"temperance," but the Rhode Island Supreme Court has interpreted the term in the context of the statute to mean " 'moderation in or abstinence from the use of intoxicating drink.' " *S & S Liquor Mart, Inc. v. Pastore*, 497 A.2d 729, 733 (R.I. 1985) (quoting *Webster's Third New International Dictionary* (1961)). The State further refined its interest in the district court below:

> [Q]uite frankly, Judge, the Liquor Control Administrator's emphasis here is not on responsible drinkers. Of course it's not. It's on people that have a very limited income, such as young people, people that don't have a lot of [money], college students who would pool their money, go through the newspaper, find out who's having the case sales, the keg sales, drive down to the liquor store and buy as much beer as they can. That's what this particular statute is designed for.

App. —— (Trial Transcript at 113).

Rhode Island's asserted substantial interest in fostering "temperance," therefore, is more specifically an interest in reducing abuse of alcohol beverages due to individual over-consumption. While such an interest is substantial, it is also very limited and expressly does not include reducing consumption of alcohol beverages by responsible adults. Nor could the State have a legitimate interest in favoring some retailers of alcohol beverages over others—an interest that apparently lies much closer to the heart of this price advertising ban than does any promotion of "temperance," as the participation of the Rhode Island

Liquor Stores Association in this case illustrates. *See Rhode Island Liquor Stores Ass'n v. Evening Call Publishing Co.*, 497 A.2d 331, 342 n.10 (R.I. 1985) (Murray, J., dissenting) ("The underlying motives of this case have nothing to do with the 'promotion of temperance' among Rhode Island citizens, but rather with the promotion of price ignorance. The plaintiff seeks to retain its members' market share by withholding price information from Rhode Island citizens.").

The State "must demonstrate that the harms it recites are real," *Edenfield*, 113 S. Ct. at 1800, and the Court "must identify with care the interests the State itself asserts." *Id.* at 1798. *Amici* do not doubt that the harms of alcohol abuse are real, but they seriously question whether the State's real interest in banning alcohol beverage price advertising is, in fact, to promote "temperance." Even accepting the State's purported justification, however, the State fails to satisfy the remaining two factors of the *Central Hudson* test.

III. RHODE ISLAND'S PRICE ADVERTISING BAN DOES NOT DIRECTLY ADVANCE THE STATE'S ASSERTED INTEREST TO A MATERIAL DEGREE.

The third *Central Hudson* factor requires that the State prove that its price advertising ban "directly advance[s] the state interest involved." 477 U.S. at 564. Based on the record evidence, the district court found as a matter of fact that the State had failed to prove that the ban had any significant impact on levels of alcohol consumption in Rhode Island. The First Circuit ignored the district court's findings and utilized presumptions rather than evidence to support the price advertising ban. The appellate court also employed only a "reasonableness" review of the price advertising ban, derived in large measure from its view of the Twenty-first Amendment. Presumptions, however, do not satisfy the State's burden of proof, and the Twenty-first Amendment is simply inapplicable. The State has not carried its burden to prove

that the price advertising ban directly advances the State's asserted interest in "temperance" to a material degree.

A. The State Must Prove as a Matter of Fact That the Price Advertising Ban Directly Advances a Substantial Governmental Interest.

This Court has made it abundantly clear that the State bears a heavy burden of proof to demonstrate as a matter of fact that restrictions on commercial speech directly advance a substantial government interest in a material way.

> [T]he Government carries the burden of showing that the challenged regulation advances the Government's interest "in a direct and material way." That burden "is not satisfied by mere speculation and conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree."

Rubin, 115 S. Ct. at 1592 (quoting *Edenfield*, 113 S. Ct. at 1800); *accord Ibanez*, 114 S. Ct. at 2089. "Without this requirement, a State could with ease restrict commercial speech in the service of other objectives that could not thmselves justify a burden on commercial expression." *Edenfield*, 113 S. Ct. at 1800; *accord Rubin*, 115 S. Ct. at 1592.

The First Circuit acknowledged that the burden of proof is on the State, but asked "to what extent?" 39 F.3d at 7. The appellate court also posited the questions, "What should a court do if there is no empirical evidence either way and expert opinions go both ways? . . . Should the court be free to choose?" *Id.* The court observed that "[t]he district court held that it was an issue for it to decide, unfettered, between competing witnesses, and since, on its weighing the evidence, the court was not presuaded that the State was correct, it failed. We do not think the

burden that strict. It is not correctness, it is reasonableness." *Id.*

The First Circuit's analysis is inconsistent with this Court's commercial speech jurisprudence. The burden is indeed "that strict," and the district court employed the correct approach, recognizing the duty of the court to require the state of Rhode Island to prove, with specific admissible evidence, that the price ban directly and materially advances the asserted governmental interest. In addition to defining this First Amendment duty in *Rubin*, *Ibanez*, and *Edenfield*, the Court addressed this issue extensively in *Turner Broadcasting Sys. v. FCC*, 114 S. Ct. 2445 (1994), a noncommercial speech case that involved a challenge to "must-carry" regulations requiring cable television operators to transmit on their cable systems the over-the-air signals of local commercial and public broadcast stations. Even while observing that substantial deference was due to Congress' "unusually detailed statutory findings," *id.* at 2461, the Court "stressed in First Amendment cases that the deference afforded to legislative findings does 'not foreclose [the Court's] independent judgment of the facts bearing on an issue of constitutional law.'" *Id.* at 2471 (plurality op. of Kennedy, J.) (quoting *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 129 (1989)); *see also Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, No. 94-749, 1995 WL 360192 (1995). Exercising its independent judgment, the Court in *Turner Broadcasting* reversed the grant of summary judgment in favor of the government and remanded the case to the three-judge district court panel for additional judicial findings of fact:

> [U]nless we know the extent to which the must-carry provisions *in fact* interfere with protected speech, we cannot say whether they suppress "substantially more speech than . . . necessary" to ensure the viability of broadcast television. Finally, the record fails to provide any *judicial findings* concerning the availability and efficacy of "constitutionally

> acceptable less restrictive means" of achieving the Government's asserted interests.

Id. at 2472 (plurality op. of Kennedy, J.) (emphasis added and citation omitted) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989), and *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 129 (1989)).

The Court's recent commercial speech cases echo this requirement that the State must establish as a result of judicial fact-finding—not deference to legislative determination—that the challenged regulation directly advances a substantial State interest. *See Rubin*, 115 S. Ct. at 1593 ("anecdotal evidence and educated guesses" held insufficient to overcome "the weight of the record"); *Ibanez*, 114 S. Ct. at 2091-92; *Edenfield*, 113 S. Ct. at 1800.[1] Significantly, the plurality in *Turner Broadcasting* cited *Edenfield* for the proposition that in defending a regulation on speech designed "to redress past harms or prevent anticipated harms," the government "must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Turner*

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[1] The Court's most recent commercial speech decision upheld a speech restriction but reinforced the requirement that the State satisfy its evidentiary burden to prove that the restriction directly and materially advances the State's substantial interest. *Florida Bar v. Went For It, Inc.*, No. 94-226, 1995 WL 365648 (June 21, 1995). "After scouring the record," the Court found the evidentiary "record mustered by the [State] is noteworthy for its breadth and detail" and was "at no time refuted, save by the conclusory assertion that the rule lacked 'any factual basis.'" *Id.* at 5-6. In that case, the State carried its burden of proof, like any other civil litigant, by producing admissible evidence that was uncontradicted by its opponents. Here, in sharp contrast, the State failed to produce credible evidence to support its speech ban and did not rebut its opponents' evidence showing no causal connection between price advertising and alcohol consumption or abuse. *See infra* pp. 15-20.

Broadcasting, 114 S. Ct. at 2470 (plurality op. of Kennedy, J.).

The Court thus has already answered the First Circuit's questions about the proper allocation of the burden of proof. The State must establish by a preponderance of the evidence that its restrictions on speech directly advance a substantial State interest in a material way. Where, as here, the State has proffered no empirical evidence to support any causal connection between its ban and any reduction in consumption or abuse, the State has failed to satisfy its burden of proof.[2] Courts must be especially vigilant to ensure that the State carries its evidentiary burden when the restrictions on speech represent a legislative attempt to overtly manipulate consumers through a ban on truthful speech about a legal product; a legislature that opts to manipulate its citizens' behavior through enforced ignorance must bear a particularly heavy burden to justify it. *See Bates v. State Bar of Arizona*, 433 U.S. 350, 375 (1977) ("we view as dubious any justification [for the suppression of commercial speech] that is based on the benefits of public ignorance"); *accord Virginia Pharmacy*, 425 U.S. at 769-70.[3]

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[2] Even in those limited circumstances in which a substantial State interest involves predictive policy judgments for which empirical support is not available, the courts' review at a minimum must "assure that, in formulating its judgments, [the legislature] has drawn reasonable inferences based on substantial evidence." *Turner*, 114 S. Ct. at 2471 (plurality op. of Kennedy, J.). As the evidence before the district court demonstrates, however, such limited circumstances in which empirical data could not be produced are not presented in this case, and even if they were, substantial evidence does not support the inferences on which the State and the First Circuit rely. *See infra* pp. 15-18.

[3] In *Florida Bar*, the Court upheld Florida's restrictions on certain direct mail solicitations, but distinguished and reaffirmed the Court's previous decisions invalidating restrictions "motivated primarily by paternalism." *Florida Bar*, 1995 WL 365648 at 7 n.2. Rhode Island's ban on truthful price advertising falls squarely within these prior cases and is indistinguishable from the restric-

The State's burden of proof, therefore, is not satisfied through judicial deference to the legislature's choice among alternatives it reasonably believes may advance its interests. Rather, courts must ensure that if the State attempts to foster even a substantial government interest by restricting constitutionally protected speech, it must prove that the restriction demonstrably advances the asserted interest. If the State cannot make that demonstration, its restriction fails under the First Amendment.

B. Rhode Island Has Not Proven That Its Price Advertising Ban Directly Advances the Promotion of "Temperance" in a Material Way.

Rhode Island failed to present any credible evidence to the trier of fact to prove that its ban on advertising the price of alcohol beverages directly advances "temperance." The State submitted only the testimony of a single expert witness, Henry Saffer, Ph.D., a professor of economics at Kean College in New Jersey, who "testified that alcohol advertising bans affect alcohol abuse." *44 Liquor Mart*, 829 F. Supp. at 548. Following a thorough review of this testimony, the district court concluded that the witness "did not, in any meaningful way, consider a number of variables that influence the public's consumption of alcohol." *Id.* The court also concluded that while the witness "knew that the national alcoholic beverage consumption trend for the past ten years has declined, he had no idea of what the trend has been in Rhode Island. Nor had he made any determination as to how much lower prices might be expected to go if the price advertising ban were lifted." *Id.* at 549. The studies on which Dr. Saffer based his testimony, moreover, addressed alcohol advertising in general, rather than price advertising in particular, and thus "did not deal with the

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tions that the Court struck down in *Virginia Pharmacy* because of their "highly paternalistic approach" of keeping consumers in ignorance. 425 U.S. at 770.

precise issues presented in this litigation." *Id.* As a whole, therefore, the court found Dr. Saffer's testimony unpersuasive. *Id.* at 548.

Witnesses who testified for the plaintiffs, on the other hand, testified that "there is no empirical evidence that the presence or absence of alcohol price advertising significantly affects levels of alcohol consumption." *Id.* at 546. Specifically with regard to price advertising, Reginald Smart, Ph.D., a scientist with the Addiction Research Foundation in Toronto, Canada, testified that he agreed with the authors of three different studies that focused on price advertising,

> which concluded that bans on price advertising have no effect on alcohol consumption. Dr. Smart used Rhode Island as a classic example of the fallacy of conclusions to the contrary. Rhode Island, a license state, which has a ban on alcohol price advertising, has a "fairly high level of alcohol consumption, about 2.86 gallons of absolute alcohol per person." It ranks in the upper 30 percent of the states in per capita consumption. In other license states that allow price advertising, alcohol consumption is lower.

Id. (citations omitted). Indeed, Dr. Smart testified that one such study " 'established quite clearly that for all states there was no relationship between a price ad ban and no price ad ban when it came to alcohol consumption.' " *Id.* at 547.

"Based on the record presented, [the district court found] as a fact that Rhode Island's off-premises liquor price advertising ban has no significant impact on levels of alcohol consumption in Rhode Island." *Id.* at 549. The court found that "[a]t best, price advertising is one factor among many that influence alcohol consumption patterns." *Id.* at 554. The district court correctly concluded based on these factual findings that the State failed to carry its burden of proof to show that its price

advertising ban directly advances its asserted interest in promoting "temperance." *Id.*

The First Circuit, however, ignored these factual findings in favor of a series of self-generated presumptions:

> [T]here would seem to be inherent merit in the State's contention that competitive price advertising would lower prices, and that with lower prices there would be more sales. We would enlarge on this. There are doubtless many buyers whose consumption is sometimes measured by their free money. If a buyer learns that plaintiffs charge less, is he not likely to go there, and then buy more? Correspondingly, if ignorant of lower prices elsewhere, will he not tend to buy locally, at the higher price, and thus buy less? Further, if Association members would fight plaintiffs' advertised prices, as they presage, by lowering their own, then, again, might there not be more buys?
>
> . . . . Advertising must be generally productive, or so much money would not be spent on it. We do not consider, in the absence of any affirmative contradiction to rely on, that the district court was free to hold [this inference] unreasonable.

44 Liquormart, 39 F.3d at 7-8 (citation omitted). The appellate court thereupon upheld Rhode Island's price advertising ban, shifting the burden of proof from the State to those challenging the speech restrictions and conclusively presuming a remarkable sequence of unproven "facts": (1) price advertising results in increased competition among liquor stores; (2) increased competition from price advertising lowers prices for alcohol beverages; (3) lower prices result in increased sales of alcohol beverages; (4) increased sales result in more consumption of alcohol beverages; and (5) increased consumption results in abuse of alcohol beverages.

Virtually no commercial speech would survive under the First Circuit's standard for judicial scrutiny of govern-

ment restrictions. Not only did the court contribute its own presumptions—which, like the State's presumptions, were unsupported by credible record evidence—but record evidence actually contradicted virtually all of the presumptions underlying the appellate court's decision. Dr. Smart testified that studies show overall prices for alcohol beverages were the same without regard to whether they are sold by State-controlled stores or licensed private retailers, and "States with price ad bans didn't have lower consumption than those who had no such ban." *44 Liquor Mart*, 829 F. Supp. at 547. This testimony was uncontradicted.[4] Indeed, the State's witness—an economist—"acknowledged that if a company could increase its market share by advertising prices, it could increase its own profits without affecting overall consumption." *Id.* at 549.

Thus, the record wholly undermines all but one of the First Circuit's "reasonable" presumptions and demonstrates that price advertising (1) does not necessarily lower prices for alcohol beverages, (2) does not increase overall consumption, and (3) may increase a retailer's profitability through acquiring more market share at the expense of its competitors, rather than as a result of an increase in overall consumption of alcohol beverages.

Tellingly, the only State presumption the record does not contradict is the one that undermines the reality of the State's asserted interest: price advertising will result in increased competition among liquor stores (but without affecting consumption). This presumption—or more accurately, fear—explains the participation of the Rhode Island Liquor Stores Association in this case. The obser-

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[4] The State's only attempt to counter this testimony came in the form of "evidence—although not directly focused on price advertising—that some research groups believe that alcohol advertising leads to increased overall consumption." *44 Liquor Mart*, 829 F. Supp. at 547. The State failed to rebut the fact that studies of actual experiences with price advertising in other states demonstrated the lack of any causal connection between price advertising and overall consumption.

vation of Rhode Island Supreme Court Justice Murray is as applicable now as it was ten years ago:

> Why does [the Rhode Island Liquor Store Association], an organization whose members earn their livelihood through the retail sale of intoxicating beverages, seek to enforce a statute that discourages the retail sale of those very same intoxicating beverages? I think the answer to this question goes to the heart of the issue of whether [Rhode Island's price advertising ban] does in fact further the state's purported goal of "promoting temperance" (which really means "discouraging the retail sales of intoxicating beverages"). Given the record before this court, and my conclusion that the burden of proof lies with [the Association], I can only conclude that [the statute] affects *patterns* of consumption, not *volume* of consumption. The Rhode Island Liquor Store Association is concerned, and understandably so, that the advertisements at issue in this case are costing its members customers. The underlying motives of this case have nothing to do with the "promotion of temperance" among Rhode Island citizens, but rather with the promotion of price ignorance. The [Association] seeks to retain its members' market share by withholding price information from Rhode Island citizens.

Rhode Island Liquor Stores Ass'n v. Evening Call Publishing Co., 497 A.2d 331, 342 n.10 (R.I. 1985) (Murray, J., dissenting) (emphasis in original).

The record evidence in this case fully supports Justice Murray's analysis of the true purpose underlying the price advertising ban. The Court is thus presented with yet another example of a state purporting to promote a substantial interest when in reality "restrict[ing] commercial speech in the service of other objectives that could not themselves justify a burden on commercial expression." *Edenfield*, 113 S. Ct. at 1800. As this Court held in *Virginia Pharmacy*, the State legitimately may attempt to protect selected businesses from competition in various ways,

> But it may not do so by keeping the public in ignorance of the entirely lawful terms that competing [businesses] are offering. In this sense, the justifications [the State] has offered for suppressing the flow of . . . price information, far from persuading us that the flow is not protected by the First Amendment, have reinforced our view that it is.

425 U.S. at 770.

Rhode Island's ban on price advertising does not directly advance the State's purported interest in promoting "temperance," and is unconstitutional. *See, e.g. Central Hudson*, 447 U.S. at 564 ("the regulation may not be sustained if it provides only ineffective or remote support for the government's purpose").

IV. THE PRICE ADVERTISING BAN IS MORE EXTENSIVE THAN NECESSARY TO ACHIEVE THE STATE'S ASSERTED INTEREST.

The State also fails to satisfy its burden under the forth *Central Hudson* factor to prove that its ban on alcohol price advertising is no more extensive than necessary to achieve its purported interest in promoting "temperance." The State contends that the ban is sufficiently tailored to its goal because it minimizes demand for alcohol beverages by "increas[ing] the 'search costs' of consumers and reduc[ing] the incidence of 'price wars' between retailers, thus providing an 'artificial floor' for liquor prices." *44 Liquor Mart*, 829 F. Supp. at 554. The district court specifically concluded that these "ends may be easily accomplished by direct regulation controlling the retail prices of alcoholic beverages." *Id.* at 555. According to the First Circuit, however, "This is not an answer; the State is entitled to a reasonable choice. This includes choice of method—it is not obligated to prove that some other method, *e.g.*, taxation, would be less effective." 39 F.3d at 7.

Once again, the district court maintained a firmer grasp on this Court's commercial speech jurisprudence than the First Circuit. Consideration of reasonable alternatives to

restrictions on speech is an integral part of the Court's analysis of the fit between the State's means and its ends. "[I]f there are numerous and obvious less-burdensome alternatives to the restriction of commercial speech, that is certainly a relevant consideration in determining whether the 'fit' between ends and means is reasonable." *City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505, 1510 n.13 (1993); *see New York State Ass'n of Realtors, Inc. v. Shaffer*, 27 F.3d 834, 844 (2d Cir.) (rejecting commercial speech restrictions in light of government failure to prove that alternatives would be ineffective), *cert. denied*, 115 S. Ct. 511 (1994). Indeed, the Court recently found that the existence of such alternatives was dispositive of the inquiry under the fourth *Central Hudson* factor. *See Rubin*, 115 S. Ct. at 1593-94 ("We agree that the availability of these options, all of which could advance the Government's asserted interest in a manner less intrusive to respondent's First Amendment rights, indicates that [the speech restriction] is more extensive than necessary.").

The First Circuit's refusal to consider reasonable alternatives to Rhode Island's price advertising ban obviously resulted from the appellate court's misconstruction of this Court's "reasonableness" inquiry. The inquiry is whether it is reasonable to ban speech to achieve the State's objective in light of the availability of alternative means to that end, not whether the speech ban is one alternative among other reasonable measures. *See, e.g., Edenfield*, 113 S. Ct. at 1798.

Numerous and obvious less-burdensome alternatives to the State's price advertising ban exist. The State's asserted interest is to promote "temperance," which the State has defined to mean reducing abuse of alcohol beverages due to over-consumption. *See supra* pp. 8-9. The State can promote "temperance" far more effectively through additional speech (*e.g.*, public service announcements and community educational programs addressing alcohol abuse) than by banning disclosure of truthful

information. The State can also achieve its objective by directly regulating the retail sale of alcohol beverages (*e.g.*, enacting and enforcing laws restricting illegal sales and sales to persons obviously intoxicated). As discussed above, the State has failed to prove any causal connection between price and abuse of alcohol beverages, but even if such a cause-and-effect relationship could be proven, direct State control of the price of alcohol beverages, consistent with the antitrust laws, would be a more direct and effective way to regulate price levels than banning speech and would be neutral under the First Amendment.

The existence of these reasonable alternatives more than amply demonstrates that the price advertising ban is far more extensive than necessary to promote any "substantial" State interest in "temperance," particularly in light of the State's failure to produce any evidence to prove that the ban promotes "temperance" at all.[5] The State's attempt to achieve its purported goals through a ban on truthful, nonmisleading commercial speech "strikes at the heart of the First Amendment. This is because it is a covert attempt by the State to manipulate the choices of its citizens, not by persuasion or direct regulation, but by depriving the public of the information needed to make a free choice." *Central Hudson*, 447

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[5] Indeed, having failed to prove that its price advertising ban directly advances the State's purported interest in promoting "temperance," the State necessarily has also failed to satisfy its burden under the fourth *Central Hudson* factor. If a speech ban provides only ineffective or remote support for the State's objective, the ban by definition is more extensive than necessary to achieve the State's purported goal. *See, e.g., Edenfield*, 113 S. Ct. at 1800; *Central Hudson*, 447 U.S. at 564. In addition, this Court in *Rubin* rejected the relevance of the dictum in *Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986), that the power to ban the product includes the power to ban speech advertising the product. *Rubin*, 115 S. Ct. at 1590 n.2. Both in footnote 2 and generally, *Rubin* supersedes the relaxed application of the *Central Hudson* test in *Posadas* which, in any event, has no bearing on the strict application of *Central Hudson* required in this situation.

U.S. at 574-75 (Blackmun, J., concurring). The State has failed to justify its blatant manipulation through public ignorance, and the advertising price ban accordingly violates the First Amendment.

V. THE TWENTY-FIRST AMENDMENT DOES NOT ALTER THE STATE'S BURDEN OF PROOF UNDER *CENTRAL HUDSON*.

The State nevertheless argued to the First Circuit that under the Twenty-first Amendment, the price advertising ban is entitled to an "added presumption" in favor of its validity, citing *California v. LaRue*, 409 U.S. 109 (1972).[6] The Court, however, recently rejected a similar argument by observing that "*LaRue* did not involve commercial speech about alcohol, but instead concerned the regulation of nude dancing in places where alcohol was served." *Rubin*, 115 S. Ct. at 1590 n.2.[7] To the extent

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[6] The State also cited *Queensgate Investment Co. v. Liquor Control Comm'n*, 433 N.E.2d 138 (Ohio), *appeal dismissed*, 459 U.S. 807 (1982), as a further basis for diluting the applicable standard for reviewing restrictions on commercial speech concerning alcohol beverages. By accepting review of this case, however, the Court has indicated that such restrictions raise a substantial federal question, regardless of how the Court's prior disposition of *Queensgate* has been interpreted. *Compare, e.g., 44 Liquor Mart*, 829 F. Supp. at 553 (Supreme Court's summary dismissal lacked reasoned opinion and involved distinguishable factual predicate) *with, e.g., 44 Liquormart*, 39 F.3d at 8 (summary dismissal has precedential effect and is factually indistinguishable). The Court's disposition in *Queensgate*, however, has been the source of significant confusion, and the Court should take this opportunity to clarify this issue. *See, e.g., Dunagin v. City of Oxford*, 718 F.2d 738 (5th Cir.) (en banc) (relying in part on *Queensgate* to justify application of a deferential *Central Hudson* standard to restrictions on alcohol beverage advertising), *cert. denied*, 467 U.S. 1259 (1984); *S & S Liquor Mart, Inc. v. Pastore*, 497 A.2d 729 (R.I. 1985) (same).

[7] The Court made this observation in the course of flatly rejecting the Government's argument that because alcohol beverages are potentially harmful products, advertising for these products should be subject to a lesser form of scrutiny than commercial speech concerning other products—a claim that the State has not made here.

that the State's argument maintains any vitality in light of *Rubin*, the Court has also found that the Twenty-first Amendment "primarily created an exception to the normal operation of the Commerce Clause," not a separate framework for analyzing restrictions on individual rights guaranteed by other constitutional provisions:

> Once passing beyond consideration of the Commerce Clause, the relevance of the Twenty-first Amendment to other constitutional provisions becomes increasingly doubtful. As one commentator has remarked: "Neither the text nor the history of the Twenty-first Amendment suggests it qualifies individual rights protected by the Bill of Rights and the Fourteenth Amendment where the sale or use of liquor is concerned."

Craig v. Boren, 429 U.S. 190, 206 (1976) (quoting PAUL BREST, PROCESSES OF CONSTITUTIONAL DECISIONMAKING, CASES AND MATERIALS 258 (1975)).

The Court has consistently concluded that the Twenty-first Amendment does not alter the standards for assessing the constitutional validity of government action infringing individual rights. *See id.* at 207 ("the Court has never recognized sufficient 'strength' in the [Twenty-first] Amendment to defeat an otherwise established claim of invidious discrimination in violation of the Equal Protection Clause"); *Wisconsin v. Constantineau*, 400 U.S. 433 (1971) (same for Due Process Clause). The Court reached the same conclusion in the context of the First Amendment's Establishment Clause. *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 122 n.5 (1982).

The Court addressed the nature of a State's exercise of Twenty-first Amendment authority through restrictions on commercial speech in *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984). In that case, Oklahoma required local cable television systems to delete advertisements for certain alcohol beverages when retransmitting out-of-state signals within Oklahoma. The Court held that Oklahoma's interest in discouraging alcohol consumption

by retricting some (but not all) advertising was "modest," and "engage[d] only indirectly the central power reserved by § 2 of the Twenty-first Amendment—that of exercising 'control over whether to permit importation or sale of liquor and how to structure the liquor distribution system.'" *Id.* at 715 (quoting *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 110 (1980)). The Court found that such "indirect" exercise of Twenty-first Amendment authority was outweighed simply by a federal statute intended to ensure widespread availability of diverse cable television services, *id.* at 715-16; the end result in *Capital Cities* would have been even clearer had the Court reached the issue of weighing Oklahoma's ban against the Constitutional provision insuring freedom of speech.

The state regulations upheld in *LaRue* and subsequent cases thus were exercises of literal Twenty-first Amendment power to regulate the conditions for alcohol sales on licensed premises and only indirectly regulated marginally "expressive" conduct. Indeed, the "critical fact" to the Court in *LaRue* was that the State "has not forbidden these performances across the board. It has merely proscribed such performances in establishments that it licenses to sell liquor by the drink." *LaRue*, 409 U.S. at 118; *see id.* at 119-20 (Stewart, J., concurring). *LaRue* and its progeny thus stand "not for the proposition that the twenty-first amendment overrides the first but for the more modest notion that twenty-first amendment power over alcohol consumption is broad enough to embrace state power to zone strong sexual stimuli away from places where liquor is served." LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 6-24, at 478 n.15 (2d ed. 1988); *accord Michigan Beer & Wine Wholesalers Ass'n v. Attorney General*, 142 Mich. App. 294, 308-09, 370 N.W.2d 328, 335 (1985), *cert. denied* 479 U.S. 939 (1986). State restrictions on commercial speech must be evaluated under the *Central Hudson* factors regardless of the product or service that speech concerns. *Rubin*, 115 S. Ct. at 1590 n.2.

CONCLUSION

Government manipulation of its citizens through public ignorance is anathema to our system of government, which depends on fully-informed citizen decisionmaking to function properly. Rhode Island nevertheless seeks to influence the public's behavior by withholding truthful, nonmisleading information about the price of legal products. Yet, the State has failed to prove—as it must—that such drastic action advances its purported interest in fostering "temperance," much less that its ban on speech is no more extensive than necessary to achieve that goal in light of the availability of numerous and more effective alternatives that do not implicate free speech rights. Rhode Island's ban on advertising the price of alcohol beverages, therefore, violates the First Amendment and should be struck down.

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APPENDIX

Identity of Individual *Amici*

The Newspaper Association of America ("NAA") represents approximately 1,525 daily newspapers representing more than 90 percent of the newspaper circulation in the United States. NAA membership also includes a substantial number of non-daily U.S. newspapers.

A.H. Belo Corporation, through its subsidiaries, owns daily and weekly newspapers in the Dallas-Forth Worth metropolitan area, seven network-affiliated television stations in markets throughout the United States, and is majority owner of an international video syndication and distribution business.

Advance Publications, Inc., directly or through subsidiaries, publishes 26 newspapers in 24 cities throughout the United States, as well as sixteen national magazines. It also owns a major book publishing company, Random House, Inc.

The Copley Press, Inc., publishes *The San Diego Union-Tribune* and nine other daily newspapers in California and Illinois, whose combined circulation is approximately 750,000.

Cox Newspapers, Inc., a subsidiary of Cox Enterprises, Inc., is the parent company of daily newspaper publishers in 15 cities. Combined with Cox Enterprises' *Atlanta Journel & Constitution*, these newspaper publishers have a total daily circulation of 1,244,573 and a combined Sunday circulation of 1,735,204. Cox Newspapers, Inc., also is a parent corporation of six weekly publishers with a combined circulation of 455,500, as well as advertising distribution and book publishing companies.

Donrey Media Group publishes 51 daily newspapers and 51 non-daily publications in 17 states. The Donrey newspapers have an average daily paid circulation of

768,379. The company also operates ten outdoor advertising companies and five cable television companies.

Dow Jones & Company, Inc. publishes, *inter alia, The Wall Street Journal*, the largest circulation daily newspaper in the country, as well as *Barron's National Business and Financial Weekly, the Dow Jones News Services* and, through its Ottaway Newspapers, Inc. subsidiary, newspapers in 29 communities in 13 states.

The Hearst Corporation is a diversified privately held communications company. It publishes numerous nationally distributed consumer magazines, daily and non-daily newspapers, business publications and hard-cover and soft-cover books. It also owns and operates a leading features syndicate and several television and radio broadcast stations.

The New York Times Company publishes, *inter alia, The New York Times*, a daily newspaper with a national circulation of 1.15 million daily and 1.75 million on Sunday. The company also publishes *The Boston Globe*, 27 regional newspapers and 10 national sports/leisure magazines; operates six network-affiliated television stations and two radio stations; and runs a number of wire services and news and feature syndicates, and various electronic publishing activities.

Providence Journal Company publishes *The Providence Journal-Bulletin*, the largest circulation newspaper in Southern New England, owns or partially owns and operates nine broadcast television stations in geographically diverse markets, and owns or partially owns and operates cable television systems serving approximately 750,000 subscribers in nine states.

Thomson Newspapers Holdings, Inc., publishes 104 daily and 31 weekly newspapers in 30 states, largely in smaller and medium-sized towns and cities, and operates a national news service out of Washington.

Tribune Company is a communications company owning the *Chicago Tribune*, Orlando *Sentinel*, the Fort Lauderdale *Sun-Sentinel*, the Escondido, California *Times-Advocate*, the Palo Alto *Times-Tribune*, the Newport *News*, Virginia *Daily Press*, and television stations in Chicago, New York, Los Angeles, Denver, Atlanta, New Orleans, and Philadelphia.